86-255

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHAEL A. KUZMIAK,

Petitioner,

vs.

PATRICIA KUZMIAK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether a California state court's assumption of jurisdiction, in marital dissolution proceedings, over a military member's nondisability retired pay and Hawaii and Arizona real property violated the due process clause of the Fourteenth Amendment, the privileges and immunities clauses of the United States Constitution and the Fourteenth Amendment, and the jurisdictional provisions of the Federal Uniform Services Former Spouses' Protection Act, 10 U.S.C. section 1408.

2. Whether federal law or Congressional intent precludes a California state court, in marital dissolution proceedings, from dividing military nondisability retired pay that is derived from a military member's separation pay under 10 U.S.C. section 1174.

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OPINION BELOW [1]

The Court of Appeal of the State of California, Division Six of the Second Appellate District, issued an opinion in this case. A copy of this opinion appears in Appendix A to this Petition at pages 1 through 31. Portions of this opinion were certified for publication and reported as Kuzmiak v. Kuzmiak, 176 Cal.App.3d 1152, 222 Cal.Rptr. 644 (1986).

JURISDICTION

The Order of the California Supreme Court denying review after judgment by the California Court of Appeal was entered on May 22, 1986. A Petition for Writ of Certiorari can be filed within ninety (90)

1/ The caption of the case in this court contains the names of all parties. Rule 21.1(b), Rules of the Supreme Court of the United States.

days of said denial. American Railway Express Co. v. Levee, 263 U.S. 19 (1923). Jurisdiction of this court is invoked pursuant to 28 U.S.C. sections 1257(3), 2101(c), and 2106, in that the application of community property principles to military separation and nondisability retired pay as well as to out-of-state real property threatens grave harm to the clear and substantial federal interests in federal military forces. McCarty v. McCarty, 453 U.S. 210 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1978). Further, under 28 U.S.C. 2403(b), the constitutionality of California Civil Code, section 4803, is drawn in question and appropriate service has been made. Rule 28.4(c), Rules of the Supreme Court of the United States.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions considered in this case are:

1. Article IV, Section 2, Clause 1, of the Constitution of the United States, which provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

2. The Fourteenth Amendment of the Constitution of the United States, which provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; . . . . "

3. 10 U.S.C. section 1408(c)(4), which provides:

"A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court or (C) his consent to the jurisdiction of the court."

4. California Civil Code, section 4800(a), which provides, in part:

" . . . the court shall, either in its judgment of dissolution of the marriage . . . or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties

equally.

5. California Civil Code, section 4803, which provides, in part:

"As used in this part, 'quasi-community property' means all real and personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition."

STATEMENT OF CASE

Through marital dissolution proceedings, the Superior Court of the State of California for the County of Santa Barbara (hereinafter "superior court") assumed jurisdiction to divide quasi-community [2]/ personal and real property of a career Air Force Officer and his wife.

Michael Kuzmiak was a Captain with the United States Air Force. [3]/ He grew up in New Jersey and entered Air Force service in that state on May 6, 1966. (Appendix A, p. 3) The marriage to Patricia Kuzmiak

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2/ Quasi-community property is defined by California Civil Code, section 4803, set forth, in full, at page 5 hereof.

3/ Because Captain Kuzmiak was "passed over" twice when considered for the grade of Major, he was involuntarily discharged on February 28, 1983 from the United States Air Force under 10 U.S.C. section 632. He immediately enlisted in the United States Air Force as an enlisted member, a Sergeant.

occurred four (4) months later in New Jersey; but the couple, on the date of the marriage, moved, under military orders, to Texas. Subsequently, Captain Kuzmiak served, under military orders, in Texas, New York, North Dakota, and commencing in 1975, in California. (Appendix A, p. 3)

While stationed in California under military orders, Captain Kuzmiak maintained a New Jersey driver's license, registered his car in New Jersey, and voted in New Jersey by absentee ballot. (Appendix A, p. 4) He filed an annual certificate with the military stating that he was a New Jersey resident; and he was thereby exempt from New Jersey income taxation. (Appendix A, p. 4) Captain Kuzmiak filed California nonresident income tax returns during the time that he was in California. (Appendix A, p. 4)

Throughout the marital dissolution proceedings, Captain Kuzmiak contended and testified that he was, at all times, a domicile of New Jersey, not California; that he moved to and stayed in California only because of military orders; and that he never intended to become domiciled in California. (Appendix A, pp. 3 and 4)

Patricia Kuzmiak, his wife, never denied or contradicted this evidence or the testimony of Captain Kuzmiak regarding his domicile. She testified that she, however, had "intended to become" a California domicile. (Appendix A, p. 4) Further, since the dissolution of their marriage [4/], she had filed California tax returns, although she still maintained a New Jersey

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4/ This was a bifurcated marital dissolution proceeding in the State of California, so that the marital status of the parties was dissolved almost three years before orders determining the division of the quasi-community property.

driver's license. (Appendix A, p. 4)

The marital dissolution proceedings were instituted by wife Patricia Kuzmiak (hereinafter sometimes "Patricia") with the filing of a petition for dissolution on June 9, 1980, asserting that she was a resident of the State of California for at least six (6) months and of the County of Santa Barbara for at least three (3) months "immediately preceding" the filing of her petition for dissolution. 5/ Husband, Michael Kuzmiak (hereinafter sometimes "Michael") filed a standard Response

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5/ These are the designated jurisdictional "residency" requirements of the State of California for its court to grant a judgment of dissolution of marriage. California Civil Code, section 4530(a).

California's jurisdiction is as broad as the Constitution permits. California Civil Procedure Code, section 410.10. Kulko v. California Superior Court, 436 U.S. 84 (1978).

(Family Law) [6] and left blank the residency declarations of said form.

On November 19, 1980, the superior court entered an Interlocutory Judgment of Dissolution of Marriage dissolving the status of marriage of the parties only. [7] On May 5, 1981, the remaining issues of the marital dissolution proceeding were to be heard, subject, however, to a stipulation between the parties and verbalized on the

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6/ In California, petitions for marital dissolution and responses thereto as well as many other marital dissolution pleadings must be on preprinted forms mandated by the Judicial Council of California. On Petitions (Family Law) and Responses (Family Law), see California Rules of Court, Rule 1215, sections (b) and (c), respectively.

7/ Interlocutory Judgments are no longer issued in California. There are now only judgments of dissolution which specify an effective date six (6) months after service or later. California Civil Code, section 4514; California Rules of Court, Rule 1287. California marital dissolution proceedings employ the concept of a "divisable divorce". Estin v. Estin, 334 U.S. 451 (1948); 3 Stanford Law Review 622.

superior court's record by Michael's trial counsel, with the agreement of Patricia's trial counsel, as follows:

> "Your Honor, at the . . . pre-trial conference we had when we were scheduling the trial, counsel for petitioner (Patricia) indicated he would stipulate as to the issue as to whether Mr. Kuzmiak is a domiciliary of the State of California and therefore subject to the jurisdiction of this Court insofar as the military retirement benefits and certain property which was brought into the State of California from another jurisdiction." 8/ (Appendix C, pp. 50 and 51)

8/ Although not very specific, this refers to the Arizona and Hawaii real properties of the parties purchased while they were stationed in North Dakota.

The trial of the remaining issues proceeded on May 5 and 6, 1981, before an assigned municipal court judge who, at the conclusion of the trial, found that

> " . . . the parties are residents of California and New Jersey" (Emphasis added, Appendix B, p. 32)

and entered various orders regarding custody and visitation, support, and California real property, reserving certain issues for further trial proceedings.

Said further trial proceedings never occurred. Instead, a stipulation by the parties and subsequent court order of October 5, 1982 vacated all orders, except those pertaining to child custody, visitation, child and spousal support and status. (Appendix B, p. 38)

On December 2 and 5, 1983, with each of the parties having new trial counsel and with a regular superior court judge, the

remaining issues were tried. A portion of the trial was devoted to the domicile of Michael and the resultant jurisdiction of the Superior Court over his military separation pay [9/] and the real property in Hawaii and Arizona. The Order After Hearing (Appendix B, pp. 34 through 46) determined, in its pertinent parts hereto,

> " . . . That Mr. Kuzmiak is a resident and domiciliary of the State of California within the meaning of California Civil Code, section 4803 and that the property in question is quasi-community in character. . . ." (Appendix B, p. 40)

9/ Retirement benefits had become separation pay. On February 28, 1983, Michael was involuntarily discharged from the United States Air Force at Vandenberg Air Force Base, as he was "passed over" for selection to the grade of Major. 10 U.S.C. section 632. He was thereby entitled to separation pay under 10 U.S.C. 1174.

" . . . That the funds received by the Husband upon separation from the United States Air Force, $24,000.00, was retirement pay or payment in lieu of retirement pay (subject to quasi-community property division) . . . " (Appendix B, p. 40)

" . . . That the two (2) pieces of unimproved real property in Hawaii and Arizona are equal in value; and the Wife is awarded the Hawaii property and the encumbrance thereon and the Husband is awarded the Arizona property and the encumbrance thereon . . . ." (Appendix B, pp. 41 and 42)

An appeal was lodged by Michael to the Court of Appeal of the State of California, Division Six of the Second Appellate District, whose determination is sought to

be reviewed. (Appendix A, pp. 1-31) The appellate briefs considered the jurisdiction of the California courts. The appellate court [10/] found that Michael was a domicile of California, as

> "A finding of husband's California domicile is necessary to support a division of his longevity pension under FUSFSPA absent his voluntary residence in the state or his consent to jurisdiction . . . (Appendix A, p. 23) (and)
>
> " . . . a finding of California domicile of both spouses is necessary to confer jurisdiction upon the court to divide any quasi-community property

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10/ Portions of the California appellate court's opinion concerning its separation pay determinations were published. Kuzmiak v. Kuzmiak, 176 Cal.App.3d 1152, 222 Cal.Rptr. 644 (1986).

of the marriage. (In Re Marriage of Fransen, (1983) 142 Cal.App.3d 419, 430. The trial judge's division of the couple's Hawaii and Arizona properties as quasi-community property rests upon this domiciliary jurisdiction." (Appendix A, pp. 24 and 25)

Thereupon, the Court of Appeal determined that:

1. Michael's military separation pay under 10 U.S.C. section 1174 was his separate property unless he applies for military retirement. If such an application occurs in conjunction with Michael's enlistment [11], his separate property would be converted into community property subject to division by the

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11/ Immediately upon his involuntary discharge as a Captain from the United States Air Force at Vandenberg Air Force Base, California, Michael enlisted, as an enlisted member in the United States Air Force, a Sergeant.

California superior court. (Appendix A, pp. 17-21)

2. The Hawaiian and Arizona real properties were subject to division by the California superior court; but since there was insufficient evidence of the value of these properties, the cause was remanded for a new hearing. (Appendix A, pp. 29 and 30)

A Petition For Rehearing was immediately lodged by Michael for consideration of the issue of Patricia's interest, if any, in Michael's military nondisability retired pay, acquired with separation pay after marital separation, 12/ and

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12/ The appellate court found that separation pay under 10 U.S.C. 1174 was Michael's separate property under McCarty v. McCarty, 453 U.S. 210 (1981). However, the appellate court further determined that by reason of Michael's enlistment, the separation pay was transmuted into community property even though the separation pay was separate property reinvested by Michael upon enlistment after marital separation, all by reason of 10

reconsideration of the appellate court's determination of Michael's California domicile since it was based primarily on Michael's enlistment after marital separation. The Petition for Rehearing was denied on February 25, 1986.

A Petition for Review by the California Supreme Court was thereafter requested by Michael. With one dissent, the Petition For Review was denied on May 22, 1986. (Appendix B, p. 48)

REASONS FOR GRANTING A WRIT

A. Jurisdiction of the California State Courts Over Quasi-Community Property.

In these marital dissolution proceedings between the Kuzmiaks, the California state court assumed jurisdiction

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U.S.C. section 1174(h)(1). Since this extension of the California court's authority had not been argued or briefed earlier, a Petition For Rehearing was lodged, but denied.

to divide the military nondisability retired pay and the Arizona and Hawaii real properties on the basis that Michael was a domicile of the state of California.

The evidence and testimony of Michael regarding his New Jersey domicile was uncontroverted. However, the state court seized upon Michael's enlistment in the Air Force at Vandenberg Air Force Base, California, immediately after his involuntary discharge under 10 U.S.C. section 632 and determined that he was a California domicile, even though these actions took place some three (3) years after the institution of the state marital dissolution proceedings. 13/

13/ The date when jurisdiction of California state courts over military nondisability retired pay is determined is currently in dispute in California. Compare Miller v. Miller, 176 Cal.App.3d 1183 (1986) (assuming jurisdiction to divide retired pay of a nonresident based on a 1970 judgment of dissolution) with

The predecessors to the California statute in question, California Civil Code, section 4803, [14] which defines "quasi-community property", had a long history of unconstitutionality. In re Thornton's Estate, 1 Cal.2d 1 (1934). Particularly, the ongoing issue was how could the State of California in dividing property brought into this state from common law states (such as New Jersey), through marital dissolution proceedings, avoid the due process and privileges and immunity clauses of the Constitution and its Fourteenth Amendment. The statute was revised in 1961. [15] Addison v. Addison,

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Tarvin v. Tarvin, 182 Cal.App.3d 721 (1986) (declining jurisdiction under similar circumstances). Review by the California Supreme Court was denied in Miller, supra.

14/ See page 4-5 for complete statute.

15/ The 1961 statute was different from the current version, as it stated ". . . 'quasi-community property' means all

62 Cal.2d 558, 399 P.2d 807 (1965) sustained its constitutionality on the basis that

> " . . . the concept of quasi-community property is applicable only if a divorce . . . is filed here <u>after</u> the <u>parties</u> have become domiciled in California" (emphasis added).
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> <u>Addison</u>, <u>supra</u>, 62 Cal.2d 558, 566.

By basing its claim of jurisdiction on

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personal property wherever situated and all real property situated in this state heretofore and hereafter acquired . . ."

Changes were made in 1975, adding real property to this section; and these changes have never been judicially challenged. The current California Civil Code, section 4803, reads, in part:

> " . . . 'quasi-community property' means all real and personal property, wherever situated, heretofore or hereafter acquired in any of the following ways . . . "

Since the statute was originally enacted in 1891, it underwent changes in 1917 and 1923 until <u>Addision</u>, <u>supra</u>, determined its constitutionality.

events happening three (3) years after the institution of these dissolution proceedings, the California state court neglected the safeguards of Addision, supra, and thereby violated the constitutional rights of Michael Kuzmiak. In re Thornton's Estate, supra.

An award of marital property to one spouse in marital dissolution proceedings is an exercise of "in rem" jurisdiction. Penoyer v. Neff, 95 U.S. 714 (1878). Jurisdiction over the marital "res" or status does not carry with it jurisdiction over marital property. Thus, the power to award property between the contending marital partners is governed by the general principles of jurisdiction of a state over property, 2 Witkin, California Procedure, 3d Ed., p. 598; 3 Stanford Law Review 622, with each right or property considered separately. Estin v. Estin, 334 U.S. 451 (1948).

Since the state court was dealing with "quasi-community property, when considering the military nondisability retired pay and the Arizona and Hawaii real properties, both parties had to be domiciled in California prior to the institution of the dissolution proceedings for the court's jurisdiction. In re Marriage of Roesch, 83 Cal.App.3d 96 (1978); Fransen v. Fransen 142 Cal.App.3d 419 (1983). This case development in California, which was emphasized by the appellate court in its opinion, Appendix A, page 25, is an application of the principles governing state jurisdiction over property. Or in terms of International Shoe Company v. Washington, 326 U.S. 310 (1945), a determination of whether there existed certain minimum contacts with California so that jurisdiction over the quasi-community property of the Kuzmiaks, the military

nondisability retired and separation pay and the Arizona and Hawaii real property, did not offend the "traditional notions of fair play and substantial justice." Shaffer v. Heitner, 433 U.S. 186 (1977); Kulko v. California Superior Court, 436 U.S. 84 (1978).

In exploring these "traditional notions of fair play and substantial justice", the California state court's jurisdiction over the Arizona and Hawaii real properties of the Kuzmiaks must consider the doctrine of Fall v. Estin, 21 U.S. 1 (1909) and its jurisdiction over th military nondisability retired and separation pay must consider, the provisions of 10 U.S.C. section 1408(c)(4).

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1. Certiorari Should Be Granted As The California State Court's Assumption Of Jurisdiction To Divide The Military Nondisability Retired Pay And Arizona And Hawaii Real Properties Within Marital Dissolution Proceedings Violated The Constitutional Rights Of Michael Kuzmiak Under The Due Process And Privileges And Immunities Clauses Of The Constitution And Fourteenth Amendment.

By uncontroverted evidence and testimony, Michael Kuzmiak was clearly a domicile of New Jersey at the institution of the California marital dissolution proceedings in 1980. The mere fact, that three (3) years subsequent thereto he enlisted in the Air Force at the same installation, Vandenberg Air Force Base, California, as he was involuntarily discharged from military service, should not change this conclusion. A military

member is not obligated to enlist in his home state; and it seems somewhat ridiculous for an individual, all at United States government expense, to travel via discharge orders to his home state to enlist and then to travel via enlistment orders back to California as Vandenberg Air Force Base was Sergeant Kuzmiak's duty station. Every indicia of domicile in New Jersey, that could be maintained, was accomplished by Michael. (See page 7, supra.) In addition, the State of California never questioned and voluntarily accepted Michael Kuzmiak's nonresident tax returns, thereby assenting to his non-resident status.

> "The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights and interests of

nonresident defendants."

(Kulko v. California Superior Court, supra, 436 U.S. 84, 91. .

See also Shaffer v. Heitner, supra. The assumption of jurisdiction by the California Superior Court over the rights and interests of Michael Kuzmiak in quasi-community property thus violated his due process rights.

Further, when Michael acquired his interest in the military nondisability retired pay and in the Arizona and Hawaii real properties, all rights in that property given him by the law of his domicile, vested in him. The application of California Civil Code, section 4803 to this property without Michael being domiciled in California prior to the institution of marital dissolution proceedings, constituted a taking of property without due process, as already determined by California's own state

supreme court. In re Thornton's Estate, supra. 16/ The California state court was decreasing Michael's property interest gained through his common law state of New Jersey and simultaneously increasing Patricia's, all in violation of the Fourteenth Amendment.

Under the privileges and immunities clause of section 2 of article IV of the Constitution of the United States, citizens of each state are given the privileges and immunities of citizens of all the states. U.S. v. Wheeler, 254 U.S. 281 (1920). The State of California cannot change the application of existing property laws to affect existing property rights of

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16/ This same argument applies to the California state court's "transmutation" of Michael's separation pay, which the California state court determined to be separate property, into community property, if Michael elected to enlist in military service after the date of separation! See pages 41-42, ante.

California citizens (Spreckels v. Spreckels, 116 Cal. 339 (1987); and thus, the California state court change of the property rights of Michael in regard to his military nondisability retired pay and Arizona and Hawaii real property constitutes a violation of the Constitution's privileges and immunities clause, as again determined by the California Supreme Court in In re Thornton's Estate, supra.

In addition, the Fourteenth Amendment protects the privileges and immunities of the citizens of the United States, as opposed to those of the citizens of the several states. Hamilton v. Regents of the University of California, 293 U.S. 254 (1934). The California state court, by reclassifying Michael's property interest in his military nondisability retired pay and Arizona and Hawaii real property, diminished his marital property rights and thereby infringed upon Michael's rights

under the Fourteenth Amendment. In re Thornton's Estate, supra.

In summary, the California state court's assumption of jurisdiction to divide Michael's military nondisability retired pay and Arizona and Hawaii real property within marital dissolution proceedings violated his constitutional rights under the due process and privileges and immunities clauses of the Constitution and the privileges and immunities clause of the Fourteenth Amendment.

2. Certiorari Should Be Granted As The Division And Award Of Out-Of-State Real Property By A California State Court Violated The Settled Doctrine Of Fall v. Estin, And Thereby, The "Traditional Notions Of Fair Play and Substantial Justice" Under International Shoe.

By assuming jurisdiction over, and then dividing, the Arizona and Hawaii real properties, the California state court

violated the "traditional notions of the fair play and substantial justice" concerning out-of-state real property as espoused in the doctrine of Fall v. Estin, supra. As recently stated in Perry v. O'Donnell, 749 F.2d 1346 (9th Cir. 1984):

> "It is well settled that although a court may have in personam jurisdiction to order one of the parties to convey to the other party a deed to property in another state, it cannot directly affect or determine title to that real property."

The order of the California trial court, as impliedly affirmed by the California appellate court, 17/ violated its own

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17/ The California appellate court in returning this case for retrial did not recognize this reasoning or the application of California Civil Code, section 4800.5, but appeared to expect the trial court to

statute, California Civil Code section 4800.5, which directs the manner in which California trial courts are to deal with out-of-state property. Rozan v. Rozan, 4 Cal.2d 322 (1957). By applying the seasoned and traditional doctrine of Fall v. Estin, supra, herein, the California state court lacked jurisdiction to affect and determine interests in the Arizona and Hawaii real properties in the manner that was accomplished herein.

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divide the Arizona and Hawaii property directly on the basis of appropriate evaluation.

3. Certiorari Should Be Granted As The Division And Award Of Military Nondisability Retired Pay Violated The Jurisdictional Provisions Of The Federal Uniform Services Former Spouses' Protection Act, 10 U.S.C. Section 1408(c)(4), And Thereby, The "Traditional Notions Of Fair Play And Substantial Justice" Under International Shoe.

The jurisdictional section of the Federal Uniform Services Former Spouses' Protection Act ("FUSFSPA"), 10 U.S.C. section 1408(c)(4), provides that a court may not divide military nondisability retired pay

> " . . . unless the court has jurisdiction over the member by reason of
>
> (A) His residence, other than because of military assignment, in the territorial jurisdiction of the court,

(B) His domicile in the territorial jurisdiction of the cour or

(C) His consent to the jurisdicti of the court."

The original version of FUSFSPA based jurisdiction upon personal jurisdiction, i.e. minimal contacts with the state. However, to allay military concerns over forum shopping spouses of service members, these provisions were amended in the House of Representatives to the current version. Sen. Rep. No. 59-502, reprinted in 1982 U.S. Code Cong. & Admin. News, pp. 1603-1604; House Conf. Rep. No. 97-749, reprinted in 1982 U.S. Code Cong. & Admin. News, p. 1572.

In evaluating the California state court's basis for jurisdiction, it is clea that Michael did not consent to the jurisdiction of the California state court This issue of jurisdiction was appropri-

ately reserved and fully litigated at trial.

The California Supreme Court has defined "domicile" and "residence" as follows:

> "Courts and legal writers usually distinguish 'domicile' and 'residence', so that 'domicile' is the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain, whenever he is absent, he has the intention of returning, but which the law may also assign him to constructively; whereas 'residence' connotes any factual place of abode of some permanence, more than a mere temporary sojourn. 'Domicile' normally is the more comprehensive term, in that it includes both the act

> of residence and the intention to remain; a person may have only one domicile at a given time, but he may have more than one physical residence separate from his domicile, and at the same time." Smith v. Smith, 45 Cal.2d 235, 239 (1955).

It was only because of military orders that Michael was in, and continued to be in, the State of California. As shown on page 7 hereof, Michael had a New Jersey driver's license, voted in New Jersey, and indeed maintained every indicia of New Jersey domicile possible. Further, this evidence and documentation of domicile went unchallenged by Patricia; and the State of California assented and accepted 8 years of Michael's nonresidencey tax returns, wherein he claimed to be a New Jersey domicile. An initial court finding, Apendix B, p. 32, even determined that he was a New Jersey domicile. The California

superior and appellate courts, however, found that Michael was a domicile on the basis of his enlistment in the United States Air Force at Vandenberg Air Force Base, [18] immediately after his involuntary discharge under 10 U.S.C. section 632, for his continuous duty assignment at Vandenberg Air Force Base. This action was realistically taken for the benefit of the Air Force [19] and should not

---

18/ Vandenberg Air Force Base, California, however, is a federal enclave. It is a pocket of federal land in California, subject to federal law and not California law. Thus, the actions taken by Michael at Vandenberg Air Force Base were taken on federal land, were not taken "in California", and should not be used against him.

19/ The United States Air Force avoided costs of travel, moving, etc. in conjunction with Michael's enlistment. He could have been discharged, moved everything to New Jersey, enlisted, and then been shipped back out to Vandenberg Air Force, California. Instead, for the benefit of the Air Force and service of his country, he remained in his ongoing duty assignment at Vandenberg Air Force Base, California.

be construed as indicative of the intent of Michael to become a resident of California. California was not Michael's "residence, other than because of military assignment" nor was it his "domicile", as required by 10 U.S.C. 1408(c)(4). Thus, the California court had no jurisdiction over the military nondisability retired pay.

B. Nondisability Retired Pay

Under the guidance of McCarty v. McCarty, supra, the California appellate court determined that Michael's separation pay under 10 U.S.C. 1174 was his separate property. However, the same court went on to hold that if Michael reinvested his separate property separation pay in conjunction with his post-marital separation enlistment with the Air Force, and was thus entitled to nondisability retired pay, his nondisability retired pay

would revert to the jurisdiction of the California court and could be divided between the Kuzimaks.

1. Certiorari Should Be Granted As Division Of Nondisability Retired Pay Acquired Through Reinvestment Of Post-Marital Separation Pay, Conflicts With The Congressional Intent Underlying Separation And Retired Pay.

McCarty v. McCarty, supra, following Wisner v. Wisner, 338 U.S. 655 (1950), and Free v. Bland, 369 U.S. 663 (1962), determined that personal entitlements of military members could not be divided by California state courts, as "it is not the province of state courts to strike a balance different from the one Congress has struck." Hisquierdo v. Hisquierdo, 339 U.S. 572, 590 (1979). As a personal entitlement of military members, separation pay is a military member's separate property, not subject to jurisdiction of,

and division by, the California state courts, as determined by the California appellate court in its published decision. If Michael chooses to reinvest his separation pay in a military career, rather than a civilian career, this result should not change. The separation pay should not then become quasi-community property subject to division by California state courts, as the California appellate court determined.

The intentions of Congress in allowing separation pay were to financially assist the discharged military member and to allow him to make a career transition. House Rep. No. 96-1462, reprinted in 1980 U.S. Code Cong. & Admin. News, p. 6361. It literally makes no difference whether this involves a change to civilian life or military enlisted life. Rather than finding a new civilian career, Michael chose to find a new military career. By

taking a reduction from being an officer, Captain, to being an enlisted member, a Sergeant, Michael will undergo significant financial losses and his career will change from one of leadership to that of technical accomplishments. Further, his retirement will be substantially less than if he had made Major. Thus, having once decided that Congress intended separation pay to be the personal entitlement of military members, the California state courts cannot take this entitlement away by restricting the manner in which the individual reinvests his separation pay.

2. Certiorari Should Be Granted As The Transmutation Of Post-Marital Separation Military Separation Pay Into Quasi-Community Property Amounts To A Taking Of Property Without Due Process In Violation Of The Fourteenth Amendment.

The California appellate court unequivocably determined that separation

pay was Michael's separate property and was not subject to California jurisdiction because of the Congressional intent in according said personal benefit.

That should have been the end of the analysis, as what happens to separate property not subject to California jurisdiction is not within the province of the state court. Its jurisdiction has been lost. It cannot condition the investment possibilities open to a discharged military member without running afoul of the Fourteenth Amendment's mandate against taking property without due process. Herein, the California state courts, under a published decision, are invoked to transmute property not subject to their jurisdiction into quasi-community property subject to their jurisdiction. Certiorari should be granted to insure that the Congressional mandates for separation pay are honored and to avoid the taking of

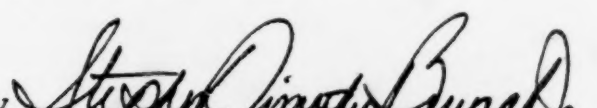
property without due process from military members in California.

CONCLUSION

Petitioner Michael Kuzmiak prays that a writ of certiorari be granted so that the due process rights, privileges and immunities afforded him and the military members under the Constitution of the United States and its Fourteenth Amendment are honored and so that the personal entitlements provided him as a discharged military officer under 10 U.S.C. section 1174 are gained.

Dated: August 15, 1986

Respectfully submitted,

By 
STEPHEN TIMOTHY BUYNAK, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE BY MAIL

I, S. Timothy Buynak, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Michael Kuzmiak, petitioner herein, hereby certifies that on August 15, 1986 pursuant to Rule 28, Rules of the Supreme Court of the United States, I served three (3) copies of the foregoing Petition For Writ Of Certiorari together with three (3) copies of the Appendix thereto, on each of the parties herein and the State of California by placing three (3) true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Barbara, California, addressed as follows:

Attorney General of the
State of California
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Charles G. Ward, Esq.
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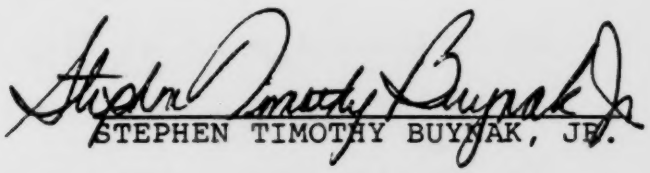
Patricia Kuzmiak
5717 Callie Lane, Apt. A
Sacramento, CA 95841

All parties required to be served have been served.

Dated: August 15, 1986



STEPHEN TIMOTHY BUYNAK, JR.

86-255

FILED
AUG 18 1986
JOSEPH F. SPANIOL
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MICHAEL A. KUZMIAK,

Petitioner,

vs.

PATRICIA KUZMIAK,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

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APPENDIX A

COURT OF APPEAL - SECOND DISTRICT
FILED JANUARY 27, 1986
CLAY ROBBINS, JR., CLERK

CERTIFIED FOR PARTIAL PUBLICATION *

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SIX

PATRICIA A. KUZMIAK,	) 2d Civil
	) No. B003410
Respondent and Appellant,	) (Super.Ct.
	) No. SM31177)
v.	) (Santa Barbara
	) County)
MICHAEL A. KUZMIAK,	)
	)
Petitioner and Respondent	)
	)

Husband, Michael A. Kuzmiak appeals the order of the trial court finding that the division of his Air Force separation pay is community property. (10 U.S.C. 1174.) 1/ We reverse the order and hold

---

1/ All statutory references are to title 10 of the United States Code unless otherwise stated.

that although the trial court had jurisdiction to divide the assets of the marriage, husband's military separation pay is his separate property unless he applies for military longevity retirement.

[[We affirm that portion of the order that contains the finding that husband is domiciled in California but reverse that portion of the order dividing the Hawaii and Arizona real property purchased during the marriage because evidence of value of the properties was insufficient.]]

---

* Pursuant to Rule 976.1 of the California Rules of Court this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g. [[/]].

Note to Report of Decisions: The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

FACTS

Husband enlisted in the United States Air Force in New Jersey on May 6, 1966. He married Patricia A. Kuzmiak four months later. The parties moved under military orders to Texas the day of their marriage. The Air Force later assigned husband to duty in New York, North Dakota and finally, California. The couple arrived in Lompoc, California in 1975 and lived together there for five years until wife filed for divorce on June 9, 1980. The trial court entered a final judgment dissolving the marriage on May 21, 1981, and decided property division two and one half years later. 2/

[[Throughout trial husband contended that he was domiciled in New Jersey and not

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2/ Trial on the property issues occurred after the Untied States Supreme Court decision in McCarty v. McCarty (1981) 453 U.S. 210 and after the enactment of the Federal Uniform Services Former Spouse's Protection Act (FUSFSPA). (Section 1408, enacted September 8, 1982.)

California. He testified that he moved to California under military orders and never intended to become domiciled here. He maintained a New Jersey's driver's license, registered his car in New Jersey, and voted by absentee ballot there. He filed an annual certificate with the Air Force stating that he was a New Jersey resident and therefore exempt from New Jersey income taxation. He filed California nonresident income tax returns. He denied his primary motive for these actions was to save taxes.

Wife testified that she had intended to become a California domiciliary. She had filed California tax returns and had attempted to obtain a California driver's license but the Department of Motor Vehicles advised her to wait until her New Jersey driver's license expired.]]

On February 28, 1983, between the time of the final judgment dissolving the marriage and the trial of the property

issues, the Air Force released husband from his command under the military's "up or out" policy. (Section 632.) [3/] Husband was then entitled to "separation pay," calculated in part on the number of years he served and his annual salary. (Sections 642,1174.) (The separation award formula is ten percent of twelve time the member's monthly basic pay times his years of active

---

3/ Section 632 provides in part: "(a) [E]ach officer...who holds the regular grade of captain or major...who has failed of selection for promotion to the next higher regular grade for the second time and whose name is not on a list of officers recommended for promotion to the next higher regular grade shall (1) be discharged on the date requested by him and approved by the Secretary concerned, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time;... (b) The retirement or discharge of an officer pursuant to this section shall be considered to be an involuntary retirement or discharge for purposes of any other provision of law."

service, with a cap of $30,000. (Section 1174, subd. (d)(1).) [4/] Husband, a captain with sixteen years of military service, received the maximum award of $30,000. At the time of husband's release from duty, he was not entitled to longevity retirement benefits because he had not completed twenty years of service. (Section 3911.)

Three or four days after his release, husband reelinsted in the Air Force. He will become entitled to longevity retirement benefits once he achieves twenty years of military service. (Section 3911.) However, the government will deduct the

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4/ Subdivision (d) of section 1174 provides: "The amount of separation pay which may be paid to a member under this section is --
(1) 10 percent of the product of (A) his years of active service, and (B) 12 times the monthly basic pay to which he was entitled at the time of his discharge or release from active duty or $30,000, whichever is less:..."

$30,000 separation pay from the retirement benefits husband will receive. (Section 1174, subd. (h) (1).) [5]/ As husband explained at trial, "[W]hen I got kicked out of the service, the option that they present to you, if you choose to stay in the service and you do get to retirement and you have collected this money, you must give it back...I will start collecting retirement when the $30,000 is paid back."

5/ Subdivision (h)(1) of section 1174 provides: "A member who has received separation pay under this section, or separation pay, severance pay, or readjustment pay under any other provision of law, based on service in the armed forces, and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay so much of such pay as is based on the service for which he received separation under this section or separation pay, severance pay, or readjustment pay under any other provision of law until the total amount deducted is equal to the total amount of separation pay, severance pay, and readjustment pay received."

The trial judge divided the $30,000 as a community retirement benefit or payment in lieu of retirement.

[[While residing in North Dakota, the couple purchased property in Arizona and Hawaii for approximately $6,000 per property. Wife testified at trial that she believed the properties were presently equal in value although she gave no reason for her opinion. Husband testified that he had no opinion as to value. After a separation, wife continued mortgage payments on the Hawaii property and husband continued payments on the Arizona property.

The trial judge found that husband was domiciled in California, finding it significant that he remained in California when discharged from the Air Force, reelinsted here in the Air Force, and purchased a condominium here after separation from wife. He also]] [[awarded the Hawaii property to wife and the Arizona

property to husband, after finding the properties were equal in value based upon wife's opinion testimony.]]

On appeal husband contends that his military separation pay is his separate property under McCarty v. McCarty (1981) 453 U.S. 210, and the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA) (Section 1408) and that by analogy, California courts have found layoff and termination benefits to be the separate property of the receiving spouse. [[He also contends that assuming his separation pay to be a retirement benefit, federal courts have long held that military retirement benefits cannot be community property because such benefits are not deferred compensation; he is not domiciled in California for purposes of subdivision (c)(4) of section 1408 of FUSFSPA and California's quasi-community property law (In re Marriage of Roesch (1978)

83 Cal.App.3d 96); and (5) there is insufficient evidence of the value of the Hawaii and Arizona properties to support their equal division.]]

DISCUSSION

Separation Pay

For many years under California law, a spouse had a community property interest in retirement benefits earned by the other spouse form employment during the marriage. In 1981 McCarty v. McCarty, supra, 453 U.S. 210, held that a state may not divide military longevity retired pay incident to a divorce absent a federal statute permitting such action. The United States Supreme Court examined the military retirement scheme and concluded that application of state community property laws conflicted with that scheme because Congress intended retired pay to be a personal entitlement of the service member.

(McCarty, supra, at pp. 223, 232-236) Thus, the court impliedly overruled California decisions as contrary to congressional intent.

In direct response to McCarty, Congress enacted the Federal Uniformed Services Former Spouse's Protection Act (FUSGSPA). (Section 1408; House Conference Report No. 97-749, 1982 U.S. Code Congressional & Admin. News, p. 1570.) FUSFSPA, however, does not permit the states unlimited powers over military retirement benefits. For example, a nonmember spouse may not sell or assign his or her interest. (Subd. (c)(2).) The parties must have been married 10 years (subd. (d)(2)) and payments to the nonmember spouse may not exceed 50 percent of the member's disposable pay (subd. (e)(1)). (In re Marriage of Costo (1984) 156 Cal.App.3d 781, 786-787.) Moreover, subdivision (c)(1) of FUSFSPA permits a

state court to "treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse...."(emphasis added.)

Although separation pay is calculated in a fashion similar to retired pay (Section 1401), we think it is not embraced within the meaning of "disposable retired or retainer pay" under FUSFSPA. Subdivision (a)(4) defines retired or retainer pay as a "monthly" payment; husband's separation pay here was a one-time payment. Moreover, section 1174 describes the severance benefit upon involuntary discharge as "separation pay." FUSFSPA does not mention separation pay in defining retired or retainer pay.

Furthermore, unlike military benefits based upon longevity of service, separation pay does not serve to compensate for past

services. Although longevity of service determines the amount of this one-time payment, the right to separation pay occurs only when there is an involuntary discharge of the service member. The legislative history of section 1174, awarding separation pay upon involuntary discharge, states that the purpose of the payment is to financially assist the member during the transition period until he or she obtains private employment: "The separation pay is a contingency payment for an officer who is career committed but to whom a full military career may be denied. It is designed to encourage him to pursue his service ambition, knowing that if he is denied a full career under the competitive system, he can count on an adequate readjustment pay to ease his reentry into civilian life." (House Rep. No. 96-1462, reprinted in 1980 U.S. Code Cong. & Admin. News, p. 6361.)

If a marriage subsists at the time the service member is involuntarily discharged, the loss of employment becomes a community loss and separation pay serves to ameliorate this loss. If the service member is not married at the time of discharge, however, the adjustment to civilian life is his alone to make. Accordingly, the separation pay should be his separate property.

We have located but one reported decision analyzing the community or separate property characteristics of separation pay. In Perez v. Perez (Tex. 1979) 587 S.W.2d. 671, the military released the husband from duty under circumstances entitling him to separation pay. Despite their divorce seven years earlier, wife sued for a portion of the payment, contending it was a retirement benefit acquired during the marriage. The Texas Supreme Court concluded the purpose

of the payment was to assist the service member in adjusting to civilian life, and the payment was not recompense for past services. (Perez, supra, at p.673.) The court also held that application of community property principles to the payment would defeat federal objectives. (Ibid.) The court expressly declined to rule, however, whether wife was entitled to any retirement benefits if husband reenlisted and served until retirement. (Ibid.)

In similar cases, California courts have analyzed the purposes of "termination" or "layoff" benefits in determining their separate property or community character. In re Marriage of Skaden (1977) 19 Ca.3d 679, concerned termination benefits consisting of a percentage of insurance premiums collected on insurance policies placed by a former insurance agent. Our Supreme Court concluded that the language

of the employment contract indicated that the commissions were community property because they were deferred compensation for the agent's previous endeavors. (Skaden, supra, at pp. 687-688.)

In In re Marriage of Wright (1983) 140 Cal.App.3d 342, an assistant hospital administrator received termination pay when he resigned his position. Wright's employer testified that the payment was made in recognition that Wright would encounter difficulties in securing future employment as a hospital administrator. (Id., p.343.) Since the payment was made after the parties separated, the court held the payment was separate property. (Id., p. 345)

In re Marriage of Flockhart (1981) 119 Cal.App.3d 240, concerned a "weekly layoff benefit" paid to displaced timber employees when the government expanded Redwood National Park. The court analogized the

federal layoff benefit to disability benefits and recognized that both compensate the recipient for loss of future earnings occasioned by layoff or disability. (Flockhart, supra, at p. 243) The court then denied wife any community interest in the layoff benefits because they did not compensate husband for employment during marriage. (Ibid.)

We are satisfied that Congress did not intend separation pay to be compensation for past services, and that under the reasoning of Flockhart and the California disability benefits decisions (In re Marriage of Stenquist, (1978) 21 Cal.3d 779, 787), the payment is the separate property of the service member. Furthermore, FUSFSPA does not discuss court division of separation pay incident to divorce. This would end the matter if it were not for subdivision (h)(1) of section 1174 (fn. 5, supra), permitting the

government to deduct separation pay from a service member's longevity retirement benefits as they are received.

If a member reenlists after involuntary discharge and subsequently receives a longevity pension after serving 20 years, the purposes of the separation pay have not fulfilled. Subdivision (h)(1) of section 1174 recognizes this by compelling reimbursement of separation pay from the member's retirement payments. There is no reason for finding separation pay to be the member's separate property once the member reenlists and earns a longevity pension.

Therefore we conclude, wife presently has an interest in husband's nonmatured longevity pension. (In re Marriage of Brown (1976) 15 Cal.3d 838, 842.) Husband's application for a longevity retirement pension and the government's withholding of $30,000 from this retirement pay deprives

wife of her community property interest in these funds. Our Supreme Court has held, that when a husband who is a service member elects to take a disability pension over a longevity pension, he cannot defeat the community property interests of his wife by unilaterally transmuting community property into separate property. (In re Marriage of Stenquist, supra, 21 Cal.3d. 779, 782. Such an election is inconsistent with "the protective philosophy of the community property law." (Ibid.) We think this reasoning pertains here.

Although McCarty v. McCarty, supra, appears inconsistent with In re Marriage of Stenquist, supra, the reasoning of Stenquist is still vital. Our Supreme Court recently affirmed and applied the Stenquist reasoning to private disability insurance proceeds purchased with community funds in In re Marriage of Saslaw (December 31, 1985, S.F. 24612) __ Cal.3d __). The

court declared that "...disability benefits have been denominated community property to the extent that they equal the benefits foregone under a retirement pension. (Ibid.)

We also note that McCarty technically did not discuss an election of one form of benefit over another. (In re Marriage of Mastropaolo (1985) 166 Cal.App.3d 953, 959.) Moreover, within months of McCarty, Congress enacted FUSFSPA with the manifest purpose of nullifying McCArty. (Id., at p. 960.)

For these reasons, we conclude that wife has a community property interest in husband's longevity pension, including the $30,000 separation pay the government will withhold from his retirement benefits. This holding recognizes the separate property characteristic of the separation pay (until husband's actions in reenlisting and earning a longevity pension) and also

protects wife's rights to a community property asset. Moreover, our holding does not frustrate congressional intent that separation pay ease the service member's reentry into civilian life.

The proper division of husband's longevity retirement benefits remains within the trial court's discretion. The parties may reach a reasonable agreement concerning division of the benefits. (In re Marriage of Gillmore (1981) 29 Cal.3d. 418, 428.) If not, the trial judge may divide the benefits according to any of the methods described by our Supreme Court in Gillmore, pp. 428-429 or Skaden, supra, 19 Ca.3d. 679, 688-689.

[[Retirement Benefits as Deferred Compensation

Husband next argues that federal courts have long considered military retired pay to be payment for current, reduced services and not deferred

compensation. (Citations in McCarty v. McCarty, supra, 453 U.S. 210, 221-223, and fn. 16.) He contends this characterization binds state courts. We disagree.

It is true that federal decisions have held military retired pay is not deferred compensation. Our Supreme Court has held otherwise, however, on numerous occasions. (Aloy v. Mash (1985) 38 Cal.3d. 413, 420-421; In re Marriage of Brown, supra, 15 Cal.3d 838.) We are not free to disagree with that characterization.]] [[Moreover, we note that the United States Supreme Court in McCarty expressly refused to decide whether "federal law prohibits a State from characterizing retired pay as deferred compensation..." (McCarty v. McCarty, supra, 453 U.S. 210 at p. 223.)

Congress, of course, may determine the character of a federally created benefit, and this determination binds the states. (U.S. Const., art. VI, cl.2.) Congress has

done this by enacting FUSFSPA, permitting division of husband's mature or nonmature longevity pension here. For this reason, the federal decisions husband cites are not pertinent.

Domicile

Husband contends there is insufficient evidence to support the trial judge's finding that he is domiciled in California. We disagree and conclude that although opposing inferences could be drawn from the evidence, the trial judge's conclusion rests upon sufficient evidence. (Bowers. v. Bernards (1984) 150 Cal.App.3d 870, 873-874.)

A finding of husband's California domicile is necessary to support a division of his longevity pension under FUSFSPA absent his voluntary residence in the]] [[state or his consent to jurisdiction. Subdivision (c)(4) of FUSFSPA confers jurisdiction upon a state court to divide a

service member's retired or retainer pay by reason of "(A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court." The original version of FUSFSPA introduced in the Senate did not contain this provision; jurisdiction obtained by personal jurisdiction over the parties evidenced by minimum contact. A House of Representatives amendment to the bill added subdivision (c)(4) to allay military concerns of forum-shopping by the spouse of the service member. (Sen. Rep. No. 97-502, reprinted in 1982 U.S. Code Cong. & Admin. News, pp. 1603-1604; House Conf. Rep. No. 97-749, reprinted in 1982 U.S. Code Cong. & Admin. News, p. 1572.)

Moreover, a finding of California domicile by both spouses is necessary to

confer jurisdiction upon the court to divide any quasi-community property of the marriage. (In re Marriage of Fransen (1983) 142]] [[Cal.App.3d 419, 430.) The trial judge's division of the couple's Hawaii and Arizona properties as quasi-community property rests upon this domiciliary jurisdiction.

Domicile is the one location with which a person has the most settled and permanent connection; it is the place where he intends to remain and when absent, intends to return. (Smith v. Smith (1955) 45 Cal.2d 235, 239; In re Marriage of Leff (1972) 25 Cal.App.3d 630, 641-642.) "To acquire a domicile of choice in a place, a person must intend to make that place his home for the time at least." (Rest.2d Conf. of Laws, section 18.)

A change of residence incident to military orders does not alter one's domicile absent intent to change domicile.

(Johnson v. Johnson (1966) 245 Cal.App.2d 40,46.) Direct evidence may establish intent, although in a particular case, intent "may be more satisfactorily shown by what is done than by what is said." (Briggs v. Superior Court (1947) 81 Cal.App.2d 240,244.)

Husband testified that he intended to retain his New Jersey domicile; he maintained his driver's]] [[license, car registration and resident tax status there. He also voted there by absentee ballot, and this he points out is an important indicator of domicile. (In re Marriage of Leff, supra 25 Cal.App.3d 630, 642.) He did not, however, own real property in New Jersey. After his involuntary discharge from the military, husband chose to remain in California and reenlisted here. Although this occurred several years after wife filed this action, it bears upon his domiciliary intent at that earlier time.

Even though conflicting inferences may be drawn from all the evidence presented at trial, we may not reweigh the evidence and draw opposing inferences. (Id., at p. 641)

General Appearance

The trial judge also found that the court requisite jurisdiction to divide the marital property because husband had entered a general appearance in this action. Between the time of the final judgment dissolving the marriage and the trial concerning property division, husband moved the court twice for orders concerning child support, child custody and]] [[visitation. We agree that these efforts constituted a general appearance by husband.

In a pre-trial settlement conference the parties agreed that husband could litigate domicile despite husband's filing a response to wife's petition to dissolve the marriage. A hearing was held

concerning domicile (and other issues) but the parties agreed to vacate the judgment of the trial judge at that hearing. Thereafter, husband twice moved for orders regarding child support, custody and visitation. A motion seeking relief on the merits constitutes a general appearance by the moving party. (In re Marriage of Jacobson (1984) 101 Cal.App.3d 465, 472. Once a party has consented to jurisdiction, he may not attack jurisdiction later. (Ibid.) Husband therefore waived any rights afforded by the stipulation to litigate jurisdiction, even assuming the stipulation extended to the court's jurisdiction by any means and not just domicile.

Valuation of Hawaii and Arizona Properties

In response to a question whether she believed the Arizona and Hawaii properties were equal in value, wife replied yes. The trial judge based his equal]] [[division

of the properties, Hawaii property to wife, Arizona property to husband, upon this evidence. This bare opinion of value, unsupported by reasons, is insufficient to determine the present value of the properties. (Bowers v. Bernards, supra, 150 Cal.App.3d 870, 873-874.)

Evidence Code section 813 permits an owner or spouse of the owner of real property to testify to the value of real property as a nonexpert witness. However, an owner's testimony must be based upon those reasons upon which an expert relies in forming his opinion. (Evid, Code. section 814; Jefferson, Cal. Evidence Benchbook (2d ed. 1982) section 29.1, p. 977.) It is a serious question whether the trial judge may assign any weight to an owner's bare opinion of value, bereft of supporting reasons, (Jefferson, op.cit., at p. 978.) "Such evidence hardly seems 'credible' or 'substantial' evidence for

the trier of fact to reach a fair determination of the value of real property involved in the actions." Wife's bare opinion here is insufficient to establish the present value of the properties.]]

Accordingly, the order is reversed and the case remanded for a new hearing. Each party to bear own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

GILBERT J.

We concur:

STONE, P.J.

ABBE, J.

Zel Canter, Judge

Superior Court County of Santa Barbara

Rodney S. Melville, Melville & Iwasko, and

Robert O. Angle, for Respondent and Appellant.

Charles G. Ward for Petitioner and Respondent.

APPENDIX B

SUPERIOR COURT MINUTES
Honorable ROBERT G. ECKHOFF, JUDGE
ASSIGNED, SANTA MARIA MUNICIPAL COURT,
Clerk HOWARD C. MENZEL

Reporter: W. Barnett, Pro Tempore
Sheriff: W. Brundage

May 6, 1981 10:30 a.m. CONTESTED

SM 31177 PATRICIA ANN KUZMIAK
&
MICHAEL A. KUZMIAK
NP:
AT ISSUE: 12-05-80
4HCT-Disso.

HUSEMAN
BEATTY

Further trial proceeded with Court, counsel and parties present.

Patricia Ann Kuzmiak recalled for further examination as a witness on her own behalf.

Petitioner resets.

Michael Kuzmiak recalled for further examination as a witness on his own behalf.

Respondent rests. Testimony closed.

Counsel made their arguments to the Court.

The Court now finds that the parties are residents of California and New Jersey.

It is now ordered that respondent shall move from the family residence by June 1,

1981; that the family residence shall not be sold for a period of five years and after five shall be sold; petitioner and minor children to reside in family home; that respondent shall make house and tax payments and when sold respondent shall be reimbursed for said payments and the balance shall be divided equally among the parties; that respondent shall pay to petitioner the sum of $150.00 per month per child as and for child support and $250.00 per month as and for spousal support commencing May 1, 1981; that petitioner shall have custody of the minor children of the parties; that said matter is referred to the Mediator for report and recommendations at respondents cost; that each party shall pay their own attorney fees and court costs; that spousal support shall terminate if petitioner remarries, dies, cohabites, or upon further order of court; that the court shall retain jurisdiction over child support and spousal support; that the other properties shall be sold and after debts are paid the balance shall be divided equally; that petitioner shall have the volkswagon automobile and respondent shall have any remaining automobiles; that the Court shall retain jurisdiction over the furniture, Insurance Policies, respondents retirement and upon further briefing by counsel and matter shall be set down for further hearing on September 1, 1981 at 10:00 A.M. subject to being advanced.

Counsel for petitioner shall prepare the necessary order in accordance with the court's order, having it approved as to form and present to the Court for signature and filing.

Let an order be prepared accordingly.

FILED
SUPERIOR COURT
OCT 5, 1982
HOWARD C. MENZEL, County Clerk
C Torres, Deputy ClerK

The Law Offices of
CHARLES G. WARD
515 East Ocean Avenue
Lompoc, California 93436
(805) 736-2368

Attorney for Patricia Ann Kuzmiak

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA BARBARA

In re the marriage of	) Case No. SM 31177
Petitioner: PATRICIA ANN KUZMIAK	) STIPULATION AND ORDER THEREON
and	)
Respondent: MICHAEL A. KUZMIAK.	)

The parties appeared, each with counsel, on September 23, 1982, in Department SMI of the above-entitled Court. The parties, in open Court, entered in to the following Stipulation:

1. Petitioner withdraws here request that respondent be found in contempt of the Court's previous orders and further withdraws her request for reimbursement for attorney fees and costs expended;

2. Respondent is to pay unto petitioner, forthwith, the sum of $550.00 for an acknowledged August, 1982, arrearage for child and spousal support;

3. Petitioner acknowledges that upon payment of the aforementioned $550.00, respondent is current to date in his spousal and child support obligations;

4. The parties agree to have the family residence appraised by a mutually-agreed to appraiser within thirty (30) days of the date of this Order, the appraisal to be made as to the value of the residence as of June 1, 1981;

5. Respondent agrees to pay into a blocked interest-bearing account that can only be released by Court Order a sum equal to one-half (½) of the net equity of the family residence after deduction of the mortgage payment and obligation to respondent's parents (this is an unrecorded Second). If respondent is unable to or refuses to create said account by January 31, 1983, the residence is to be listed for sale by a mutually-acceptable broker February 1, 1983, with the net proceeds of sale remaining in escrow subject to Court-ordered disposition;

6. The parties further agree and therefore request that the Order made by this Court May 6, 1981, with the exception of those orders pertaining to child custody, visitation, child and spousal support, and the dissolution of the marriage, are to be

vacated, with this Court retaining jurisdiction over all issues previously presented to the Court; and

7. The parties agree to attend Mediation on the questions of child custody and visitation. Said Mediation is scheduled for September 28, 1982, at 9:30 a.m., in Department SM3 of the above-entitled Court.

Dated: Sept 24, 1982

s/
CHARLES G. WARD
Attorney for
Petitioner

Dated: Sept. 27, 1982

s/
RODNEY S. MELVILLE
Attorney for
Respondent/
Husband

ORDER

The Court orders that the above Stipulation is approved and the parties are ordered to abide thereby. The Court further orders that the orders of this Court made May 6, 1981, are vacated except as to those provisions of the Order relating to child custody, child support, spousal support, and the dissolution of the marriage. Said excepted provisions are to remain in full force and effect with the Court retaining jurisdiction over all other issues raised at the May 6, 1981, hearing.

Dated: Oct 5, 1982

s/
Royce R. Lewellen
Judge of the Superior Court

FILED
SUPERIOR COURT
JAN 13, 1984
HOWARD C. MENZEL, County Clerk
By L. Hidalgo, Deputy Clerk

The Law Offices of
CHARLES G. WARD
515 East Ocean Avenue
Lompoc, California 93436
(805) 736-2368

Attorney for Patricia Ann Kuzmiak

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA BARBARA
SANTA MARIA BRANCH

In re the marriage of	) Case No. SM 31177
	) ORDER
Petitioner: PATRICIA ANN KUZMIAK	) AFTER HEARING
and	) THEREON
	) (December 2 &
Respondent: MICHAEL A. KUZMIAK.	) 5, 1983)

This matter came on regularly for hearing in the above-entitled Court, Dept SM2, and was heard by the Honorable ZEL CANTER, Judge.

The parties, each represented by counsel, were present and the Court, after

hearing and viewing all evidence presented, finds and orders as follows:

1. The Court approves the parties' in-Court waiver of spousal support, each from the other, and finds they acknowledged each is aware that once spousal support is waived, said right can never be reinstated.

2. That Mr. KUZMIAK is a resident and domiciliary of the State of California within the meaning of California Civil Code, Section 4803, and that the property in question is quasi-community in character.

3. That of the funds received by the Husband upon separation from the United States Air Force, $24,000.00 was retirement pay or payment in lieu of retirement pay; and, that the community interest in that sum is .8549222%, based upon a period from September 10, 1966, to separation,

June 10, 1980; and, that Wife's interest therein is one-half (½) of .8549222% of $24,000.00, to wit, $10,259.00. The court reserves jurisdiction over any tax questions raised by this division.

4. That the furniture, furnishings, appliances and housewares divided by the parties upon separation was an equal division.

5. That the insurance policies of the parties are quasi-community property with a value at the time of separation of $3,800.00; therefore, the Husband is to pay Wife $1,900.00 for her interest therein.

6. That the two (2) pieces of unimproved real property in Hawaii and Arizona are equal in value; and, the Wife is awarded the Hawaii property and the encumbrance thereon and the Husband is awarded the Arizona property and the

encumbrance thereon. The Court reserves jurisdiction over this issue to modify same if necessary to fulfill the intent of this Order.

7. That from the $44,141.00, which are the sale proceeds from the family residence, the sum of $9,000.00 should be withheld to reimburse Husband's mother for the balance on the Note owed her. If $9,000.00 exceeds the amount owed, the parties will equally divide the excess and if the balance of the Note is more than $9,000.00, the parties will equally share payment of the difference within thirty (30) days of a written demand for payment from Husband's mother.

8. After the aforementioned $9,000.00 is subtracted from the sale proceeds of $44,141.00, we have $35,141.00. That sum is to be divided in one-half (½) as each party's interest in the family

residence, $17,570.00 to Wife and $17,570.00 to Husband.

9. Husband's $17,570 should be reduced by the following sums to satisfy the Wife's award from the division of the heretofore-mentioned property:

a. $1,900.00, insurance interest; and

b. $10,259.00, retirement.

thereby making Wife's entitlement from the sale proceeds of the family residence $29,729.00 and Husband's entitlement $5,411.00

10. From Husband's $5,411.00, the sum of $3,000.00 is to be transferred to the Wife to establish a medical fund for the children, more clearly detailed in this Court's Order filed December 9, 1983, which vacated an Order made December 5, 1983, for the Husband to pay an additional $150.00 per month

toward child support for the children's medical expenses.

11. Child support for the three (3) minor children living with Wife, to wit, KAREN PATRICIA KUZMIAK, female, born June 12, 1967, now aged 16 years; DEBORAH ANN KUZMIAK, female, born September 9, 1959, now aged 14 years; and TAMARA LYNN KUZMIAK, female, born March 26, 1973, now aged 10 years, is to remain at $150.00 per month per child, for a total of $450.00 per month child support, payable in equal installments on the first and fifteenth of each and every month, pending further order of this Court

12. Custody of the said children is to preserve the existing status, to wit, the three girls are living with the Wife and the son, MICHAEL, born August 18, 1968, now aged 15 years, is living with the Husband. This arrangement is

to continue pending a yet-to-be-calendared custody hearing in this Court. Prior to said hearing, the Husband is to make arrangements to have himself, the Wife, and the four (4) children psychologically-evaluated to determine the custody question. A copy of the evaluation is to be sent to this Court and to the attorneys for each side. The Wife, if she desires, may schedule psychological evaluations for herself, the Husband and the four (4) children for the same purpose. A copy of said evaluation is to be sent to the Court and each counsel. The Court reserves jurisdiction to reimburse Wife for all of a portion of the cost expended by Wife of said evaluation. A copy of the evaluation(s) shall also be sent to the Mediator, NANCY MADSON, Santa Barbara Superior Court, 312 East Cook

Street, Santa Maria, California 93454, to assist her in preparing a custody recommendation to the Court after the parties and the children have attended another Mediation.

13. Each party is to pay their own incurred attorneys fees and costs.

Dated: Jan 13, 1984

s/
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

s/
RODNEY S. MELVILLE,
Attorney for Respondent

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 6

B003410

Robert O. Angle
1215 De La Vina St.
Suite E
Santa Barbara, CA 93101

RE: Kuzmiak, Patricia A.
VS.
Kuzmiak, Michael A.

2 Civil B003410
Santa Barbara No. SM31177

FEB 25 1986 PETITION FOR REHEARING DENIED

SUPREME COURT
FILED
MAY 22, 1986
Lawrence P. Gill, Clerk

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 6, No. B003410

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF KUZMIAK

KUZMIAK
v.
KUZMIAK

Appellant's petition for review DENIED.

Reynoso, J., is of the opinion the petition should be granted.

Bird
Chief Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 6 Jun - 2 1986

Robert O. Angle
1215 De La Vina St.
Suite E
Santa Barbara, CA 93101

RE: Kuzmiak, Patricia A.
vs
Kuzmiak, Michael A.
2 Civil B003410
Santa Barbara No. SM31177

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above-entitled cause on 01/27/86 is now final.

** Reversed and Remanded To Trial Court W/Directions.**

__Appellant __Respondent to recover costs.
x Each party to bear own costs.
__Costs are not warded in this proceeding.

CLAY ROBBINS, JR., Clerk

By:

Deputy Clerk

APPENDIX C

SANTA MARIA, CALIFORNIA,

TUESDAY, MAY 5, 1981, 2:00 P.M.

THE COURT: I MIGHT INDICATE THIS IS A CIVIL MATTER; AND, THEREFORE, WOULD NOT BE UNDER THAT NEW PROVISION.

MR. BEATTY: I'D LIKE TO AT THIS TIME -- JAMES BEATTY, APPEARING FOR THE RESPONDENT.

I UNDERSTAND MR. HUSEMAN HAS SUBMITTED HIS TRIAL BRIEF.

THE COURT: YOU HAD PREVIOUSLY SUBMITTED ONE, I BELIEVE.

MR. BEATTY: THIS IS A MORE CURRENT ONE DESCRIBING OUR PRESENT CONTENTIONS, AND I WOULD LIKE TO SUBMIT THAT AT THIS TIME AS WELL AS HIS FINANCIAL DECLARATION.

ALSO, I BELIEVE YOU WILL RECALL, YOUR HONOR, AT THE SETTLEMENT OR THE PRE-TRIAL CONFERENCE WE HAD WHEN WE WERE SCHEDULING THE TRIAL, COUNSEL FOR PETITIONER INDICATED HE WOULD STIPULATE AS TO THE ISSUE AS TO WHETHER MR. KUZMIAK IS A DOMICILIARY OF THE

STATE OF CALIFORNIA AND THEREFORE SUBJECT TO THE JURISDICTION OF THIS COURT INSOFAR AS THE MILITARY RETIREMENT BENEFITS AND CERTAIN PROPERTY WHICH WAS BROUGHT INTO THE STATE OF CALIFORNIA FROM THE OTHER JURISDICTION.

I BELIEVE WE STIPULATED THAT THAT COULD BE LITIGATED TODAY, IS MY UNDERSTANDING.

MR. HUSEMAN: THAT'S CORRECT.

MR. BEATTY: AND THAT'S BROUGHT OUT FROM THE BRIEF.

THE COURT: COUNSEL FOR PETITIONER WISH TO MAKE AN OPENING STATEMENT?

MR. HUSEMAN: NO, YOUR HONOR.

UNDER THE EVIDENCE CODE SECTION, WE WILL CALL MR. KUZMIAK TO THE STAND.

THE CLERK: IS THAT UNDER 776?

MR. HUSEMAN: YES.

MICHAEL A. KUZMIAK, JR.,

THE RESPONDENT, HAVING BEEN CALLED AS A WITNESS BY THE PETITIONER UNDER SECTION 776 OF THE EVIDENCE CODE, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE BE SEATED AND STATE YOUR NAME FOR THE RECORD.

THE WITNESS: MICHAEL A. KUZMIAK, JR.

EXAMINATION

BY MR. HUSEMAN:

Q. AND WOULD YOU STATE YOUR FULL NAME, SIR?

A. MICHAEL ANDREW KUZMIAK, JR.

Q. AND YOUR OCCUPATION?